Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1421

DESIGN & MANUFACTURING CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 2042, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR UAW & its LOCAL 2042, *et al.*

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The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 2042, *et al.*, by counsel, respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is reported at: *Design & Manufacturing Corp.* v. *UAW et al.*, 608 F.2d 767 (7th Cir. 1979).

COUNTERSTATEMENT OF QUESTION PRESENTED

A labor agreement provides that a sympathy strike is allowed under certain circumstances. The employer and union disagree about what the facts are, in a given case, and the union holds a sympathy strike. There is no other dispute between the parties, arbitrable or otherwise, at *that* location. Does *Buffalo Forge Co.* v. *U.S.W.*, 428 U.S. 397 (1976), control?

STATEMENT OF THE CASE

For the instant purposes, Respondents will accept Petitioner's Statement of the Case.

ARGUMENT

Petitioner argues that the decision below cannot be reconciled with *Buffalo Forge* and its predecessors, *Gateway Coal* and *Boys Markets*.[1]

The labor agreement's no-strike clause here permitted sympathy strikes when there is both a movement of work and the hiring of new employees. D & M claims that the sympathy strike here was "over a dispute that is arbitrable under the agreement notwithstanding the fact that it was also a sympathy strike." (Pet. Br. 13)[2]

But the Court of Appeals held that the cause of the sympathy strike was *not* the movement of work and hiring of new employees, but the *legal* strike for a new agreement at the sister local. (Pet. A. 6, 13-14) The movement of work and hiring did not "cause," it only

[1] *Buffalo Forge Co.* v. *U.S.W.*, 428 U.S. 397 (1976); *Gateway Coal Co.* v. *U.M.W.*, 414 U.S. 368 (1974); *Boys Markets* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970).

[2] Pet. Br. refers to the Petition For A Writ Of Certiorari; Pet. A. refers to the Appendix attached to the Petition.

permitted, the sympathy strike. (Pet. A. 6) The employer had an unquestioned right to move the work and hire additional employees. (Pet. A. 6) The *only* dispute between the employer and the union at *this* location is the construction of the no-strike clause itself. (Pet. A. 6)

In *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970), this Court found a narrow exception to the Norris-LaGuardia Act[3] where a no-strike clause existed and the strike was over an arbitrable issue.

In *Gateway Coal Co.* v. *U.M.W.*, 414 U.S. 368 (1974), the exception was allowed where a safety dispute was subject to arbitration. The claim that public policy did not favor the arbitration of safety disputes was specifically rejected. The Court also held that § 502 of the Labor-Management Relations Act, 29 U.S.C. § 143, did not justify a refusal to work because of the workers' subjective good faith belief of physical danger.[4]

However, in *Buffalo Forge Co.* v. *U.S.W.*, 428 U.S. 397 (1976), the Court refused to apply *Boys Markets*' "narrow exception" to sympathy strikes. There, the cause of the sympathy strike was a legal, primary, economic strike between the same company and a sister local, at another location. Since this underlying dispute could not be arbitrated, the Court held a "*Boys Markets*" injunction could *not* issue. The sympathy strike was *not* an attempt by the Union to use economic power to win an issue which the union had previously agreed to arbitrate:

> . . . the strike was not over any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of

[3] 29 U.S.C. § 104.

[4] Petitioner misreads *Gateway* as rejecting a subjective good faith belief that the union had a contractual right to strike.

> sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain. [428 U.S. at 408]

The case at bar is almost identical to *Buffalo Forge*. In both cases, the employer contended that the sympathy strike was prohibited by the no-strike clause. In both cases, the parties agreed that whether the sympathy strike violated that clause *was* subject to arbitration.

The only difference here is that the no-strike clause mentions the factual circumstances under which sympathy strikes are permitted.[5] This, it is argued, makes the question of whether the sympathy strike violates the no-strike clause more clearly arbitrable. But in *Buffalo Forge* the Court expressly *rejected* the arbitrability of the employer's claim that the sympathy strike violated the contract *as being grounds* for enjoining the sympathy strike. At the very opening of the opinion:

> The issue for decision is whether a federal court may enjoin a sympathy strike pending the arbitrator's decision as to whether the strike is forbidden by the express no-strike clause contained in the collective bargaining contract to which the striking union is a party. [428 U.S. at 399]

The Court's answer is clear:

> Concededly, the issue [whether the sympathy strike violated the no-strike clause] was arbitrable. It was

[5] In this respect this case is a sport, since the Company could have either sought a total waiver of the right to sympathy strike, *NLRB* v. *Rockaway News Co.*, 345 U.S. 71 (1953), or agreed to submit to arbitration any differences which may arise which are *not* covered by the labor agreement as in *W-I Canteen Service Inc.* v. *NLRB*, 606 F.2d 738 (7th Cir. 1979).

> for the arbitrator to determine whether there was a breach, as well as a remedy for a breach, and the employer was entitled to an order requiring the union to arbitrate . . . . However that may be, it does not follow that the District Court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator, despite the express prohibition of § 4(a) of the Norris-LaGuardia Act against injunctions prohibiting any person 'from ceasing or refusing to perform any work or to remain in any relation of employment.' If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 4. [428 U.S. at 411]

The litmus test for an injunction pending arbitration is the arbitrability, not of the employer's claim of a no-strike clause violation, but of the claim the Union was striking over, rather than arbitrating. In *Buffalo Forge* this Court insisted that it is the arbitrability of the claim held by the party with the strike option that brings a case within the narrow exception to Norris-LaGuardia:

> Striking over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute. The *quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery.
>
> * * *
>
> The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of deny-

> ing or evading an obligation to arbitrate or of depriving the employer under his bargain. [428 U.S. 407-408]

In its struggle to find a union claim to point to as one the Union was striking over rather than arbitrating, the Company grasps at the exception to the sympathy strike ban in favor of situations where work is moved and people are hired. The Union, the Company asserts, could have claimed the movement of work and hiring violated the contract. It should have arbitrated that claim, rather than striking, the Company concludes.

But the Court of Appeals addressed that view of the matter and rejected it, holding that "nothing in the collective bargaining agreement prevents the movement of such work between plant locations. . . . Hence, the legality of the sympathy strike itself under § 10.2 [of the contract] was the very subject of the parties' dispute and *Buffalo Forge* teaches that in such circumstances the district court may not enjoin a sympathy strike pending aribitration." (Pet. A. 6)

CONCLUSION

For the foregoing reasons, the Court should *deny* the petition.

Respectfully submitted,

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